IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ASPIRE BRANDS, INC. (a Delaware corporation), Plaintiff, v. ASPIRE BEVERAGE COMPANY, LLC (a Minnesota limited liability company, Defendant.	))))))))))))	Civil Action No. 1:16-cv-10948 JURY DEMANDED

COMPLAINT

Plaintiff, Aspire Brands, Inc. ("Plaintiff"), by its attorneys, complains against Defendant Aspire Beverage Company, LLC ("Defendant"), as follows:

THE PARTIES

1. Plaintiff is a Delaware corporation with a place of business at 200 E. Illinois St., Suite 3611, Chicago, Illinois 60611.

2. Defendant is a Minnesota limited liability company with a place of business at 5500 Lincoln Drive, Suite 170, Edina, Minnesota 55436.

NATURE OF THE ACTION

3. This trademark action includes multiple counts, some of which are pled in the alternative under Federal Rule of Civil Procedure 8(d), and some of which are for declaratory judgment pursuant to 28 U.S.C. § 2201, including the following: (1) a claim for declaratory judgment that Plaintiff has priority of rights in the mark ASPIRE over any rights Defendant may be found to have in the mark ASPIRE; (2) a claim for declaratory judgment that Plaintiff's use of the mark ASPIRE does not infringe any rights Defendant may be found to have in the mark

ASPIRE; (3) a claim for declaratory judgment that Defendant is estopped from asserting an infringement claim against Plaintiff due to estoppel and laches; and (4) a claim for trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1125(a), arising from Defendant's use of the mark ASPIRE.

JURISDICTION AND VENUE

4. Defendant is doing business in this district and thus is subject to personal jurisdiction here. On information and belief, Defendant sells the ASPIRE products at issue in this district.

5. For example, the "Store Finder" tool on Defendant's website at www.aspirebeverages.com lists over 10 Chicagoland locations where its ASPIRE products can be purchased, including Costco stores in Burr Ridge and Orland Park as well as Life Time Fitness locations throughout the Chicago suburbs.

6. On the "Store Finder" page on Defendant's website at www.aspirebeverages.com, Defendant invites consumers to purchase Defendant's ASPIRE products online via a link. Clicking on the link leads to an "Aspire Beverages Web Store," accessible through https://big.four51ordercloud.com/aspire/catalog, where beverages can be purchased.

7. This Court has jurisdiction over this Complaint based on 15 U.S.C. § 1121 (action arising under the Lanham Act), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1338(a) (action arising under any Act of Congress relating to patents or trademarks).

8. With respect to the claims for declaratory judgment herein, this Court has jurisdiction over such claims pursuant to 28 U.S.C. § 2201 since there is an actual, substantial controversy between the parties, and the Plaintiff has a reasonable apprehension of Defendant initiating litigation regarding the subject matter of the declaratory judgment counts. That apprehension comes from a letter Plaintiff's lawyer received on November 23, 2016 threatening

such litigation imminently (Exhibit A) as well as similar threats by Defendant's lawyer in the past, as detailed further *infra*.

9. Defendant's threats against Plaintiff's use of ASPIRE have spanned from at least January 2015 to the present. Under 28 U.S.C. § 2201, Plaintiff is entitled to seek a timely resolution of the declaratory judgment claims asserted herein and remove itself from the shadow of infringement litigation.

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391, as it is believed that Defendant has sold and distributed the products at issue throughout the U.S. including in this district. Venue is also proper in this district because Plaintiff is located in this district, Plaintiff sells its products within this district, and the injury and damage to Plaintiff occurred in this district.

BACKGROUND AND ALLEGATIONS COMMON TO ALL COUNTS

A. Neither Party owns a Trademark Registration for ASPIRE

11. Both the Plaintiff and the Defendant have applied to register marks consisting of and/or containing ASPIRE for beverages but neither party has a registration for any such mark.

B. Plaintiff's ASPIRE Energy Drinks are Marketed as a Healthy Energy Drink with Additional Calorie-Burning Benefits

12. In or around January 2012, Plaintiff's predecessor-in-interest shipped a pallet of ASPIRE-branded energy drinks from the U.K. to the U.S. for subsequent distribution to U.S. retailers by a U.S. distributor.

13. A pallet of cranberry-flavored ASPIRE-branded energy drinks arrived in the U.S. in early March 2012. A photo of the pallet appears below:

The mark ASPIRE appeared prominently on the cans in the pallet, as shown in the photo below:

ASPIRE
CRANBERRY FLAVOUR

14. In May 2012, the distributor of Plaintiff's predecessor-in-interest began distributing the ASPIRE-branded cranberry energy drinks, including personal delivery of products as well as shipments of products across state lines. Such distribution of the ASPIRE

drinks was made to multiple retailers for their consideration, as well as to focus group participants.

15. The distribution of the ASPIRE-branded energy drinks by the U.S. distributor in 2012 constituted use of the mark ASPIRE in U.S. commerce and such use inured to the benefit of Plaintiff's predecessor-in-interest.

16. At all times subsequent to May 2012, Plaintiff, through its predecessors-in-interest, had a firm and continuous intention to continue using the mark ASPIRE for energy drinks in U.S. commerce.

17. At all times subsequent to May 2012, Plaintiff, through its predecessors-in-interest, was actively engaged in furthering the commercialization of ASPIRE energy drinks in the U.S.

18. At no point from May 2012 to the present did Plaintiff or any of Plaintiff's predecessors-in-interest intend to abandon U.S. rights in ASPIRE for energy drinks.

19. Subsequently, Plaintiff obtained from its predecessor-in-interest all U.S. common law rights to the mark ASPIRE for energy drinks.

20. Over time, Plaintiff has expanded its line of ASPIRE energy drinks to include not only cranberry but also apple/acai and mango/lemonade flavors.

21. Plaintiff's three flavors of ASPIRE energy drinks appear below:

ASPIRE
CALORIE BURNING
NO CALORIES
NO SUGARS
NO CARBS
apple + acai
naturally sparkling and refreshing
12oz (355mL)
ASPIRE
CALORIE BURNING
NO CALORIES
NO SUGARS
NO CARBS
cranberry
naturally sparkling and refreshing
12oz (355mL)
ASPIRE
CALORIE BURNING
NO CALORIES
NO SUGARS
NO CARBS
mango lemonade
naturally sparkling and refreshing
12oz (355mL)

22. Today, Plaintiff's ASPIRE energy drinks are sold in over 1500 stores in the U.S.

C. Defendant's ASPIRE Sports Drinks are Marketed for Hydration

23. According to allegations contained in Defendant's trademark filings, the earliest date of Defendant's use of ASPIRE (or any mark containing ASPIRE) in commerce for beverages is May 2013, which is effectively deemed by the Trademark Office to be the last day in May (May 31, 2013).

24. Defendant currently sells five flavors of its ASPIRE sports drink, as shown below:

ASPIRE
ASPIRE RISE
ASPIRE
ASPIRE RUSH
ASPIRE
ASPIRE FIRE
ASPIRE
ASPIRE STORM
ASPIRE
ASPIRE ICE

COUNT I
Claim for Declaratory Judgment Pursuant to 28 U.S.C. § 2201 of Plaintiff's Priority of Rights in the Mark ASPIRE

25. Plaintiff repeats and realleges as if fully set forth herein the allegations of paragraphs 1-24 of this Complaint.

26. Defendant's earliest filing date for any U.S. trademark application consisting of or containing ASPIRE for beverages was February 22, 2013.

27. Defendant alleged to the Trademark Office that its first use of the mark ASPIRE in U.S. commerce for beverages was in May 2013.

28. Plaintiff has priority of rights in the mark ASPIRE by virtue of the use of the mark on energy drinks that were manufactured by Plaintiff's predecessor-in-interest and distributed in U.S. commerce by the U.S. distributor in 2012, prior to any alleged use of ASPIRE by Defendant in commerce for beverages and prior to the filing date of any relevant application by Defendant.

29. Therefore, pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaratory judgment of priority of rights in the mark ASPIRE for energy drinks over Defendant's use of ASPIRE for sports drinks.

COUNT II
Claim for Declaratory Judgment Pursuant to 28 U.S.C. § 2201 of Non-Infringement of any Rights Defendant May be Found to Have in the Mark ASPIRE

30. Plaintiff repeats and realleges as if fully set forth herein the allegations of paragraphs 1-29 of this Complaint.

31. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment that Plaintiff's use of ASPIRE for energy drinks is not likely to cause confusion with Defendant's use

of ASPIRE for sports drinks, and that therefore Plaintiff's use of ASPIRE does not infringe any trademark rights that Defendant may have.

A. The Parties' Products are Different in Nature and are Targeted to Different Consumers

32. On information and belief, Defendant's ASPIRE sports drinks are non-caffeinated and non-carbonated.

33. On information and belief, the primary function of Defendant's ASPIRE sports drinks is to aid in rehydration following exercise, and the drinks are primarily targeted to athletes, including youth and college athletes.

34. Indeed, the following statements regarding hydration and athletes appear on Defendant's website at www.aspirebeverages.com:

UNIVERSITY OF WISCONSIN SELECTS ASPIRE SPORTS DRINKS TO HYDRATE ITS STUDENT-ATHLETES

Natural Sports Drink Brand and the University of Wisconsin-Madison Announce Partnership as Exclusive Sports Drink of University's Athletic Teams

Home » A Team

ASPIRE A TEAM

Welcome to ASPIRE Sports Drinks: A company that believes in the healthy hydration for all athletes. Sports drinks with no preservatives, no artificial flavors or colors, and most importantly: NO JUNK.

HEALTHY HYDRATION, LOWER SUGAR

ASPIRE makes products that are designed to improve the health and performance of all athletes. We conduct research and development as a means, not an end. We do what's right, not what's easy. With no artificial colors, flavors or sweeteners, ASPIRE is the clear choice for health and performance.

RAISE MONEY FOR YOUR ASSOCIATION OR TEAM!

ASPIRE supports a variety of associations, teams, youth groups and clubs by connecting you with retailers in your area

35. Defendant's website contains a section called "SCHOOLS," which states the following:

> ASPIRE sports drinks provide a great solution for schools because they are compliant with the USDA *Smart Snacks in School* guidelines. These better-for-you sports drinks with beneficial nutrients and no junk are great for anyone, anytime, anywhere.
>
> Hundreds of schools are working to improve the physical health of their students while improving the financial health of their foodservice program by selling ASPIRE in their cafeterias, student stores and concession stands. They are also serving ASPIRE, with coolers and concentrate, to their teams and student-athletes.

36. In contrast to Defendant's sports drinks, Plaintiff's ASPIRE energy drinks are caffeinated and carbonated.

37. The primary function of Plaintiff's ASPIRE energy drinks is to be a healthy energy drink with additional calorie-burning benefits.

38. Plaintiff's caffeinated ASPIRE energy drinks are not directed to youth or student athletes, and Plaintiff's cans state the following: "NOT RECOMMENDED FOR CHILDREN, PREGNANT OR NURSING WOMEN, AND THOSE SENSITIVE TO CAFFEINE (INCLUDING KNOWN HEART CONDITIONS)."

B. The Parties' Products Look Strikingly Different

39. The parties' respective products look so different that no confusion is likely to arise between them in the marketplace, as shown below:

ASPIRE
CALORIE BURNING
NO CALORIES
NO SUGARS
NO CARBS
apple + acai
ASPIRE
CALORIE BURNING
NO CALORIES
NO SUGARS
NO CARBS
cranberry
ASPIRE
CALORIE BURNING
NO CALORIES
NO SUGARS
NO CARBS
mango lemonade

ASPIRE
ASPIRE RISE
ASPIRE
ASPIRE RUSH
ASPIRE
ASPIRE FIRE
ASPIRE
ASPIRE STORM
ASPIRE
ASPIRE ICE

40. As shown above in Paragraph 39, Defendant's sports drinks are packaged in plastic bottles bearing bold colors and white tops, and they display a prominent arrow logo, bold/full fonts, and individual product names, namely, RISE, RUSH, FIRE, STORM, and ICE.

41. In contrast, Plaintiff's beverages are packaged in cans that are primarily white, bearing artistic colored leaf designs, a flowing/fancy "A" logo, and delicate fonts. Plaintiff's different flavored drinks do not each bear their own product names, but rather the flavors are indicated simply by descriptors.

C. The Parties' Products Have Different Flavors

42. The flavors of Defendant's sports drinks are not the same as the flavors of Plaintiff's energy drinks.

43. Defendant's sports drinks include the following primary flavors: (a) orange/citrus fruits/bilberry (RISE); (b) blue raspberry/other fruits/blueberry (RUSH); (c) cherries/berries/pomegranate (FIRE); (d) white and red grapes/blueberry (STORM); and (e) lemon-lime/citrus fruits/bilberry (ICE).

44. In contrast, Plaintiff's energy drinks include the following flavors: (a) cranberry; (b) apple/acai; and (c) mango/lemonade.

D. The Marketplace Realities Demonstrate that No Confusion is Likely

45. Defendant's non-caffeinated, non-carbonated ASPIRE sports drinks for athlete rehydration do not compete with Plaintiff's caffeinated, carbonated ASPIRE energy drinks with additional calorie-burning benefits.

46. The parties' respective drinks have different primary active ingredients and are distinct in terms of their nature and purpose.

47. The parties' respective drinks are primarily targeted to different sets of consumers seeking different drink attributes.

48. On information and belief, if the parties' products happened to be sold at the same stores, they would be displayed in different sections or aisles—Plaintiff's beverages with other energy drinks such as Red Bull and Monster, and Defendant's beverages with other sports drinks such as Gatorade and Propel.

49. For all the foregoing reasons, no confusion is likely to arise as between the parties' respective uses of ASPIRE, and Plaintiff's continued use of ASPIRE for its sports drinks is non-infringing.

50. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaratory judgment that Plaintiff's use of ASPIRE for energy drinks is not likely to cause confusion with Defendant's use of ASPIRE for sports drinks, and that therefore Plaintiff's use of ASPIRE does not infringe any trademark rights that Defendant may have.

COUNT III
Claim for Declaratory Judgment Pursuant to 28 U.S.C. § 2201
That Estoppel and Laches Bar any Claim of Infringement by Defendant

51. Plaintiff repeats and realleges as if fully set forth herein the allegations of paragraphs 1-50 of this Complaint.

52. On information and belief, Defendant had actual knowledge of Plaintiff's use of ASPIRE for energy drinks at least as early as December 5, 2014—almost two full years ago.

53. A phone conversation took place on or before December 5, 2014 between Chris Wadlington, Co-Founder of Plaintiff and John Montague, Co-Founder of Defendant, regarding the parties' respective uses of ASPIRE.

54. Subsequently, on January 5, 2015, Mr. Montague emailed Mr. Wadlington to notify him that a letter had been drafted requesting that Plaintiff no longer use the mark ASPIRE in the U.S.

55. Attorney Rosenberg sent a letter dated January 9, 2015 to an attorney for Plaintiff's predecessor-in-interest complaining about the use of the ASPIRE brand.

56. On information and belief, after sending the January 9, 2015 letter, Attorney Rosenberg took no further action with respect to Plaintiff's use of ASPIRE until he sent a follow-up letter to Plaintiff's predecessor-in-interest approximately three months later, on April 8, 2015, to the attention of Mr. Wadlington at 200 E. Illinois St., Suite 3611, Chicago, Illinois 60611. A copy of the April 8, 2015 letter is attached as Exhibit B.

57. In Attorney Rosenberg's April 8, 2015 letter to Mr. Wadlington (who is Co-Founder of the Plaintiff), Attorney Rosenberg expressed Defendant's alleged extreme concern about confusion arising from the parties' respective uses of ASPIRE. (Exhibit B).

58. Attorney Rosenberg's April 8, 2015 letter to Mr. Wadlington also:

- Alleged that numerous instances of actual confusion had occurred in the marketplace as between the parties' uses of their marks;
- Characterized the alleged instances of actual confusion as causing "irreparable harm" to Defendant's reputation, goodwill, and intellectual property rights;
- Alleged that the violation of Defendant's rights was "an exceptionally grave matter;"
- Demanded that Plaintiff immediately agree to change the name of its product;
- Insisted that Plaintiff agree in writing within one week from the date of Mr. Rosenberg's letter that it would comply with Defendant's demand; and
- Threatened to "move forward with resolving this matter through alternative means" if no adequate response was received within one week.

(Exhibit B).

59. Notwithstanding the threats made in Attorney Rosenberg's letter shown at Exhibit B, as well as his allegations of actual confusion and so-called "irreparable harm," from April 8, 2015 to the present Defendant has not taken any action to stop Plaintiff's use of the mark ASPIRE for Plaintiff's energy drink in the U.S.

60. Relying on Defendant's inaction, Plaintiff has continued to use ASPIRE for its energy drinks and has made substantial investments to grow its business.

61. In the past 19 months, the total number of stores in which Plaintiff's ASPIRE energy drinks are sold has grown over 100%.

62. In the past 19 months, the number of cans of ASPIRE energy drinks sold by Plaintiff in the U.S. has increased over 100%.

63. During the past 19 months, Plaintiff's ASPIRE-branded energy drinks have been widely available in the U.S. marketplace through both brick-and-mortar stores as well as through online retail stores.

64. Defendant took no action against Plaintiff's continued use of ASPIRE for the past 19 months, with full knowledge of Plaintiff's open and notorious continued use of ASPIRE.

65. By not taking any action against Plaintiff's continued use of the mark—while Plaintiff's business continued to grow and expand—Defendant implied that it was no longer intent on pursuing a claim of infringement, and/or that Defendant consented or acquiesced to such continued use.

66. On information and belief, Defendant's delay in enforcing its alleged trademark rights against Plaintiff was unreasonable.

67. Plaintiff detrimentally relied on Defendant's ongoing failure to enforce against Plaintiff any rights Defendant may be found to have in ASPIRE.

68. If any rights Defendant may be found to have in ASPIRE are now enforced against Plaintiff, Plaintiff will suffer substantial and material prejudice resulting from Defendant's 19-month delay, particularly in light of Plaintiff's tremendous growth during that time period in terms of both retail outlets and number of cans sold.

69. Therefore, laches and estoppel should prevent Defendant from now obtaining relief in any infringement action against Plaintiff.

70. Plaintiff is entitled to a declaratory judgment that any claim of infringement by Defendant arising from Plaintiff's use of ASPIRE is barred by laches and estoppel.

COUNT IV
Alternative Claim for Infringement of Plaintiff's Common Law Mark ASPIRE Pursuant to 15 U.S.C. § 1125(a)

71. Plaintiff repeats and realleges as if fully set forth herein the allegations of paragraphs 1-29 of this Complaint.

72. If this Court finds that Plaintiff has priority of rights in ASPIRE, and that there is a likelihood of confusion between the parties' respective uses of ASPIRE, and that any claims by Defendant of infringement are not barred by estoppel or laches, then Plaintiff pleads this Count IV in the alternative to Counts II and III.

73. Plaintiff has priority of rights in the mark ASPIRE over Defendant because (a) Plaintiff, through its predecessor-in-interest, used ASPIRE in U.S. commerce in 2012 when ASPIRE-branded energy drinks were distributed in the U.S.; and (b) Defendant, on information and belief, did not begin use of ASPIRE for sports drinks until 2013.

74. On information and belief, without any authorization from Plaintiff, Defendant adopted and began using the mark ASPIRE for sports drinks after Plaintiff established common law rights in the mark ASPIRE for energy drinks.

75. The mark ASPIRE is inherently distinctive for energy drinks.

76. At no time after Plaintiff's predecessor-in-interest began use of ASPIRE for energy drinks did Plaintiff's predecessor-in-interest or Plaintiff ever have any intention of abandoning such rights.

77. Defendant's use of ASPIRE for sports drinks is likely to give rise to a likelihood of confusion with Plaintiff's use of ASPIRE for energy drinks. More specifically, Defendant's

use of ASPIRE for sports drinks is likely to confuse consumers into believing that Defendant's sports drinks are made or licensed by Plaintiff, or that there is an association or affiliation between Defendant's sports drinks and Plaintiff's energy drinks or between Defendant and Plaintiff, or that Defendant's sports drinks share the same or a similar level of quality as Plaintiff's energy drinks, or that there is otherwise a relationship, sponsorship, or endorsement between Plaintiff and Defendant.

78. Defendant's actions hereinabove described constitute common law trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1125(a).

79. Because Plaintiff has no control over the nature and quality of Defendant's ASPIRE sports drinks, Plaintiff will be irreparably damaged by Defendant's continued use of the mark.

80. If consumers believe Defendant's sports drinks originate from Plaintiff, or are somehow otherwise connected with Plaintiff, and Defendant's drinks are of inferior quality, the entire goodwill and reputation Plaintiff has built in the ASPIRE mark will be put in jeopardy.

81. As a proximate result of Defendant's actions, Plaintiff has suffered and will continue to suffer great and irreparable damage to its business, goodwill, reputation and profits.

82. Plaintiff has no adequate remedy at law for Defendant's trademark infringement. Unless Defendant is enjoined from further infringement, Plaintiff will continue to suffer irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment against Defendant as follows:

A. A declaratory judgment that Plaintiff has priority of rights in the mark ASPIRE for energy drinks over any rights Defendant may be found to have in ASPIRE for sports drinks;

B. A declaratory judgment that Plaintiff's continued use of ASPIRE for energy drinks is not likely to confuse consumers and therefore does not infringe any rights Defendant may be found to have in ASPIRE for sports drinks, including an injunction against Defendant from seeking to enforce any rights it is found to have in the mark ASPIRE for sports drinks against Plaintiff's continued use of ASPIRE for energy drinks;

C. A declaratory judgment that any infringement action by Defendant against Plaintiff's continued use of ASPIRE for energy drinks is barred by estoppel and laches; and

D. Alternatively, if this Court finds that Plaintiff has priority of rights but that there is a likelihood of confusion between the parties' respective uses of ASPIRE, and that any claims by Defendant of infringement are not barred by estoppel or laches, then Plaintiff prays for an injunction prohibiting Defendant from the continued use of ASPIRE or any mark containing ASPIRE for sports drinks and related beverages, as well as for other relief to be ordered by the Court, as follows:

(1) Directing Defendant to pay over to Plaintiff all gains, profits and advantages realized by Defendant from the sale of ASPIRE sports drinks;

(2) Directing Defendant to pay over to Plaintiff all damages suffered by Plaintiff in order to compensate Plaintiff, and that such damages be trebled, pursuant to 15 U.S.C. §1117;

(3) Directing Defendant to pay over to Plaintiff damages in the form of money to be spent on corrective advertising, to dispel any actual confusion that may have already occurred among relevant consumers and in the marketplace by virtue of Defendant's acts;

(4) Awarding Plaintiff such other and further relief that the Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

Date: November 29, 2016

By: /s/Tamara A. Miller

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